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Debtor-in-Possession,  
TIARA TOWNHOMES, LLC

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA – SANTA ANA DIVISION

In re  
ROCKPORT DEVELOPMENT, INC, a  
California corporation,  
  
Debtor and Debtor-in-Possession.

- ☐ ALL DEBTORS  
☐ Rockport Development, Inc., ONLY  
☒ Tiara Townhomes, LLC, ONLY

TIARA TOWNHOMES, LLC, a California  
corporation,  
  
Plaintiff,  
  
v.  
  
EVERWIN INVESTMENT, INC., a California  
corporation,  
  
Defendant.

Case No. 8:20-bk-11339-SC

Chapter 11

(Jointly administered with  
Case No. 8:20-bk-11683-SC)

Adv. No. 8:20-ap-01128-SC

REPLY IN SUPPORT OF MOTION IN  
LIMINE NO. 1 TO LIMIT DEFENDANT’S  
(1) EVIDENCE IN RESPONSE TO  
PLAINTIFF’S MOTION FOR SUMMARY  
JUDGMENT AND (2) TRIAL EVIDENCE  
TO INFORMATION AND DOCUMENTS  
DISCLOSED AND PRODUCED BEFORE  
DISCOVERY CUTOFF

Hearing:

Date: August 18, 2021

Time: 11:00 a.m.

Ctrm.: 5C – **Via ZoomGov**<sup>1</sup>

<sup>1</sup> Video and audio connection information for each hearing will be provided on Judge Clarkson's publicly posted hearing calendar, which may be viewed online at: <http://ecf-ciao.cacb.uscourts.gov/CiaoPosted/?jid=SC>. For more details on appearing via ZoomGov, please see the “Notice of Video and Telephonic Appearance Procedures” in the Telephonic Instructions section of Judge Clarkson’s webpage.

1 TO THE HONORABLE SCOTT C. CLARKSON, UNITED STATES BANKRUPTCY COURT  
2 JUDGE, THE DEFENDANT, AND ALL INTERESTED PARTIES:

3 TIARA TOWNHOMES, LLC, a California corporation, Plaintiff and Debtor, (“Plaintiff” or  
4 “Tiara”) submits this reply in support of Plaintiff’s Motion *in Limine* to Limit Defendant’s: (1)  
5 Evidence in Response to Plaintiff’s Motion for Summary Judgment; and (2) Trial Evidence to  
6 Information and Documents Disclosed and Produced Before Discovery Cutoff (“Motion”), filed on  
7 July 22, 2021, as Dk. No. 23.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **1. Summary Argument**

10 As noted in the Motion, “[a]n important purpose of discovery is to reveal what evidence the  
11 opposing party has, thereby helping to determine which facts are undisputed ... and which facts must  
12 be resolved at trial.”<sup>2</sup> Here, Defendant (1) served subpoenas in the *final* hour; (2) *failed* to enforce  
13 compliance with the subpoenas; (3) did not move to amend this Court’s Scheduling Order to allow  
14 for responses to its subpoenas; (4) responded to Plaintiff’s written discovery request on June 30,  
15 2021 - the *last* day to conduct discovery; (5) *failed* to produce documents to Plaintiff as required by  
16 the Federal Rules of Civil Procedure prior to the expiration of the discovery cutoff date<sup>3</sup>; and (6)  
17 stated that it was in the process of subpoenaing further documents which it would rely on to support  
18 its affirmative defenses – all *after* the discovery cutoff date. Indeed, in the past 10 days Defendant  
19 has issued additional subpoenas to third parties in clear violation of the this Court’s Scheduling  
20 Order (Plaintiff will be filing a motion to quash).

21 Based on the above actions/inactions by Defendant, Plaintiff filed a motion for summary  
22 judgment. In order to protect notions of fairness, Plaintiff now seeks an order (i) limiting evidence  
23 used in response to motion to the evidence produced during discovery (and prior to the discovery  
24 cutoff date); (ii) limiting any evidence presented by Defendant at trial to evidence produced during  
25 discovery (and prior to the discovery cutoff date).

28 <sup>2</sup> *Computer Task Group, Inc. v. Brothby*, 364 F.3d 1112, 1117 (9th Cir. 2004).

<sup>3</sup> See, Motion, Grimshaw Decl., Ex. 22.

1 **2. Argument**

2 **A. The Fact That it is a Bench Trial Versus Jury Trial Is a Red Herring**  
3 **Which Does Not Absolve Defendant of Its Discovery Obligations**

4 In the Opposition, Defendant advances the argument that – “[b]ecause this is a bench trial the  
5 need for an advance ruling is “superfluous” and “unnecessary.” Opposition., 8:4-7. Citing to an  
6 unbinding District of New York authority - *Serby*<sup>4</sup> - the Opposition asserts “the risk of juror  
7 confusion or potential prejudice is not a factor in a bench trial, negating the usefulness of motions in  
8 limine.” Opposition, 8:7-9. But the Opposition conveniently omits that the above proposition was in  
9 the context of evaluating *expert witness testimony* under the *Daubert* standards:

10 “Moreover, “[i]n the context of a bench trial where there is not a concern for juror  
11 confusion or potential prejudice, the [C]ourt has considerable discretion in admitting  
12 the proffered [expert] testimony at the trial and then deciding after the evidence is  
presented whether it deserves to be credited by meeting the requirements of *Daubert*  
and its progeny.” *Id.* at 457.

13 *Serby v. First Alert, Inc.*, No. 09-CV-4229 (WFK) (VMS), 2015 U.S. Dist. LEXIS 95612, at \*3  
14 (E.D.N.Y. July 22, 2015).

15 Indeed, the *Serby* case is factually distinguishable because it does not involve Defendant’s  
16 failure to timely serve document subpoenas nor where a Defendant failed to produce documents  
17 despite ongoing discovery obligations. Separately, the *Watkins*<sup>5</sup> decision is an unpublished authority  
18 citing to the 9<sup>th</sup> Circuit decision of *Heller* for the same proposition as *Serby* – that because this is a  
19 bench trial there is no reason to make a premature ruling on evidence. But again, this is simply not  
20 the case.

21 Here, prejudice *exists* as there is no way of preparing a pre-trial stipulation without knowing  
22 what the world of evidence is going into trial. Indeed, the most compelling reason to rule on this  
23 instant Motion now is to aid the parties in drafting the joint pre-trial stipulation. The “not now later”  
24 argument will only further delay the efficient conclusion of this case. Separately, although  
25 Defendant’s opposition seems to be primarily concerned about bank records, the only financial  
26

27  
28 <sup>4</sup> *Serby v. First Alert, Inc.*, No. 09-CV-4229 (WFK) (VMS), 2015 U.S. Dist. LEXIS 95612  
(E.D.N.Y. July 22, 2015).

<sup>5</sup> *Watkins v. Mkt. Express Transp. (In re Watkins)*, 343 F. App’x 245 (9th Cir. 2009).

1 institution subpoenaed is the one that responded timely – which documents Defendant did not  
2 produce to Plaintiff. As for the remaining recipients, Sotheby’s is a realtor and Chicago Title did the  
3 closing for the Sherbourne property. Neither of these subpoenas are going to give Defendant bank  
4 statements proving anything to advance its positions and/or affirmative defenses.

5 **B. Defendant admits that it was not diligent in obtaining discovery**  
6 **despite the discovery cut-off being set over 6 months prior.**

7 Sluggish movement by Defendant in discovery does not excuse compliance with this Court’s  
8 orders. Without exception, the Court’s Scheduling Order specifically provided: “. . . *the last day for*  
9 *discovery to be completed, including receiving responses to discovery requests, is June 30, 2021,*  
10 *which is the date by which all discovery motions must be heard and resolved.*” See Motion,  
11 Grimshaw Decl., Ex. 16, pg. 1023, ¶3(f). Emphasis added. No action was taken by Defendant in  
12 January, February, March or April. Rather than act expeditiously, Defendant delayed service of its  
13 subpoenas until May– 45 days before the discovery cut-off. Yet now Defendant requests it not be  
14 penalized for its own lack of due diligence. This Court should not acquiesce to this request  
15 particularly since it prejudices Plaintiff. If Defendant had not tried to use the documents that were  
16 not produced to Plaintiff in its response to Plaintiff’s Motion for Summary Judgment (“MSJ”)   
17 perhaps no legal prejudice would have been suffered. But because Defendant affirmatively utilized  
18 the unproduced documents in its response against Plaintiff, there is clear legal prejudice to Plaintiff.  
19 At minimum, Defendant is in violation of the Court’s Scheduling Order, and allowing it to use the  
20 documents in connection with Plaintiff’s MSJ is clearly prejudicial to Plaintiff.

21 **C. Defendant Still Has Failed To Provided Copies of Documents of**  
22 **What It Intends To Use At Trial Despite Its Duty To Supplement**  
23 **Under the Federal Rules. Thus, Precluding Defendant’s Use of the**  
24 **Undisclosed Documents is Appropriate.**

25 In the Motion, Plaintiff argued that the combination of Rule 26(a), 26(e), 37(c) of the Federal  
26 Rules of Civil Procedure (“FRCP”)<sup>6</sup> precluded Defendant from attempting to admit documents due  
27  
28

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<sup>6</sup> Made applicable in bankruptcy cases by Rules 7026 and 7037 of the Federal Rules of Bankruptcy Procedure (“FRBP”).

1 to untimeliness and non-disclosure to Plaintiff. In response, Defendant argued in the Opposition: (a)  
2 FRCP 26 was not violated because the unproduced documents were not in its possession, custody or  
3 control but in the possession of a third parties (Sothebys, WFG, or Chicago Title); thus (b) as a result  
4 because FRCP 26 was not violated the documents cannot be excluded vis-a-vis FRCP 37. However,  
5 such an argument fails as it is premised on a false assumption - that no tools were available to  
6 Defendant to obtain the documents sooner. Not only could Defendant have served the subpoenas  
7 five months earlier, but it could have sought to *enforce* the subpoenas in the event of non-  
8 compliance with the aid of this Court. But neither of those actions were undertaken by Defendant.

9 As noted in FRCP 26, there is an ongoing requirement to supplement. If Defendant intended  
10 to use the documents in any way shape or form, then they had to be produced. Plainly put, there is no  
11 showing of due diligence has been made that excuses compliance with the rules and orders of this  
12 Court. Importantly, Defendant was on notice that its actions/inaction were subject to consequences.  
13 Specifically, the Scheduling Order provides “[t]he parties are specifically advised to cooperate and  
14 follow all local and federal rules. **The failure to do so may subject the offending party to**  
15 **monetary and/or non-monetary sanctions**, including the striking of the answer or dismissal of the  
16 complaint.” *See* Motion, Grimshaw Decl., Ex. 16, pg. 1023, ¶3(m). Bottomline, Defendant has not  
17 provided any information or documents under FRCP 26(a), and therefore is in violation of the  
18 Scheduling Order subjecting it to this Motion.

### 19 **3. Conclusion**

20 For the reasons in the Motion and as set forth above, and based on fairness and orderly  
21 conduct of the proceedings, Plaintiff respectfully requests this Court to exclude the introduction of  
22 documents by Defendant at trial which were not previously identified or produced during discovery.  
23

24 Dated: August 11, 2021

MARSHACK HAYS LLP

/s/ Laila Masud

26 By: \_\_\_\_\_

27 MATTHEW W. GRIMSHAW  
28 DAVID A. WOOD  
LAILA MASUD  
Attorneys for Plaintiff and Debtor and  
Debtor-in-Possession,

## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:  
870 Roosevelt, Irvine, CA 92620

A true and correct copy of the foregoing document entitled (*specify*):REPLY IN SUPPORT OF MOTION IN LIMINE NO. 1 TO LIMIT DEFENDANT'S (1) EVIDENCE IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND (2) TRIAL EVIDENCE TO INFORMATION AND DOCUMENTS DISCLOSED AND PRODUCED BEFORE DISCOVERY CUTOFF will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

**1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) **August 11, 2021**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- **ATTORNEY FOR DEFENDANT EVERWIN INVESTMENT, INC.:** Elan Darvish Elan@Darvishfirm.com, Elan.Darvishfirm@Gmail.com
- **ATTORNEY FOR PLAINTIFF TIARA TOWNHOMES, LLC:** Matthew Grimshaw mggrimshaw@marshackhays.com, mggrimshaw@ecf.courtdrive.com; kfrederick@ecf.courtdrive.com
- **ATTORNEY FOR DEFENDANT EVERWIN INVESTMENT, INC.:** Long Z Liu office@thelulawfirm.com
- **U.S. TRUSTEE:** United States Trustee (SA) ustpregion16.sa.ecf@usdoj.gov
- **ATTORNEY FOR PLAINTIFF TIARA TOWNHOMES, LLC:** David Wood dwood@marshackhays.com, dwood@ecf.courtdrive.com; lbuchananmh@ecf.courtdrive.com; kfrederick@ecf.courtdrive.com

☐ Service information continued on attached page

**2. SERVED BY UNITED STATES MAIL:**

On (*date*) \_\_\_\_\_, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

**3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) **August 11, 2021**, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

**VIA PERSONAL DELIVERY: PRESIDING JUDGE'S COPY**

HONORABLE SCOTT C CLARKSON  
UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
RONALD REAGAN FEDERAL BUILDING AND COURTHOUSE  
411 WEST FOURTH STREET, SUITE 5130  
SANTA ANA, CA 92701-4593

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

August 11, 2021 Layla Buchanan  
\_\_\_\_\_  
Date Printed Name

/s/ Layla Buchanan  
\_\_\_\_\_  
Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.